

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	Case No. 1:10-MJ-00739
	.	(AK)
Plaintiff,	.	
	.	Washington, D.C.
v.	.	March 18, 2011
	.	
RAPHAEL FARROW, ET AL.,	.	
	.	
Defendants.	.	
.	.	

INITIAL APPEARANCES/STATUS HEARINGS
BEFORE THE HONORABLE JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: U.S. Attorney's Office
By: ANGELA GEORGE, AUSA
555 Fourth Street, N.W.
Washington, DC 20530

For the Defendants: Law Offices
By: MARK L. GOLDSTONE, ESQ.
ANN C. WILCOX, ESQ.
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1 (Proceedings commenced at 9:52 a.m.)

2 THE CLERK: Okay. This is Criminal Case,
3 Year 2010-739M, United States v. Raphael Farrow, Autumn
4 Sandeen, Michael Bidwell, Evelyn Thomas, Miriam Ben
5 Shalom, Scott Wooledge, Justin Elzie, Mara Boyd, Robin
6 McGehee --

7 UNIDENTIFIED SPEAKER: (Unintelligible.)

8 THE CLERK: -- Robin McGehee, Robert Smith,
9 Daniel Choi, Ian Finkenbinder --

10 UNIDENTIFIED SPEAKERS: (Unintelligible.)

11 THE CLERK: -- and Daniel Fotou.

12 The Government -- Representing the Government
13 is Angela George.

14 Representing the Defendants is Mark Goldstone
15 and Ann Wilcox.

16 This is initial appearances and arraignments.

17 MR. GOLDSTONE: Good morning, Your Honor.

18 MS. WILCOX: Good morning, Your Honor.

19 THE COURT: Good morning, Counsel.

20 THE COURT SECURITY OFFICER: Those that don't
21 fit on a row can take some of those chairs.

22 THE CLERK: Okay.

23 Will all the Defendants please raise your
24 right hand.

25 (The Defendants are Sworn.)

1 THE CLERK: Please remain standing.

2 THE COURT: Starting on my left, would you
3 please state your name, sir.

4 DEFENDANT SMITH: Robert Carl (phonetic)
5 Smith.

6 DEFENDANT THOMAS: Evelyn Thomas.

7 DEFENDANT ELZIE: Justin Elzie.

8 DEFENDANT BOYD: Mara E. Boyd.

9 DEFENDANT WOOLEEDGE: Scott Wooleedge.

10 DEFENDANT FARROW: Raphael Jeffrey Farrow.

11 DEFENDANT FOTOU: Daniel Fotou.

12 DEFENDANT BEDWELL: Michael Bedwell.

13 DEFENDANT BEN SHALOM: Miriam Ben Shalom.

14 DEFENDANT CHOI: Daniel Choi.

15 DEFENDANT SANDEEN: Autumn Sandeen.

16 DEFENDANT MCGEHEE: Robin McGehee.

17 THE COURT: All right. Good morning, Ladies
18 and Gentlemen.

19 MS. WILCOX: Your Honor, I apologize. We
20 have a representation as to a Defendant (inaudible)
21 who's not present.

22 THE COURT: Why don't you come to the podium,
23 Counsel, so we can hear you.

24 MS. WILCOX: Your Honor, we received notice
25 this morning, actually from an airline personnel, that

1 Mr. Finkenbinder had a medical emergency and was not
2 allowed to board the plane, possibly, and was
3 hospitalized overnight.

4 THE COURT: All right.

5 Well, we'll just have to make a note of him
6 when we set this down for trial. Before we begin the
7 trial I'll advise him of the rights that (inaudible)
8 today. Thank you.

9 All right. Good morning again, Ladies and
10 Gentlemen. You have been brought before the Court
11 today pursuant to summonses that were issued. Those
12 summonses are predicated on a Criminal Complaint that
13 was filed against you by a Park Police Officer named
14 Fement (phonetic).

15 Fement claims that on November 15, 2010 at
16 about 2:30 in the afternoon, he was working at the
17 White House and all of you were on the White House
18 sidewalk; that there came a time when you handcuffed
19 yourselves to the fence that surrounds the White House,
20 and began to chant in opposition to the Government's
21 Don't Ask/Don't Tell military policy.

22 He says that other officers gave you warnings
23 that you were there in violation of the Federal
24 Regulations and you should leave, you did not, and as a
25 result, you were placed under arrest.

1 The particular statute or regulation he
2 charges you with violating is contained in the Code of
3 Federal Regulations, and he relies upon a provision of
4 it which says that you must -- it is a crime -- an
5 offense against law to violate a lawful order of a
6 Government employee -- by an agent that's authorized to
7 maintain order or control public access and movement,
8 and he says that he did that in the context of
9 controlling public movement in the area around the
10 White House. So that is the nature of the charge
11 against you.

12 In reference to this charge, you're entitled
13 to a hearing before a judge. In fact, in this case I
14 think you will not really have a hearing, you will
15 proceed to trial, since it's a violation.

16 At that trial you will, of course, have the
17 right to be represented by an attorney of your own
18 choosing.

19 You will have the right to have your guilt
20 established beyond a reasonable doubt by the Government
21 calling the witnesses against you into open court.
22 Those witnesses will have to give their testimony in
23 your presence, subject to cross-examination by your
24 counsel.

25 You, in turn, will have the right to bring to

1 court, any witnesses you wish. You'll have the right
2 to have subpoenas issued to bring them here, to have
3 subpoenas issued to bring before the Court, any
4 documents that you think are important for the Court to
5 see.

6 You'll have the right to testify, but please
7 bear in mind that you can never be forced to be a
8 witness against yourself.

9 Now, the Government has filed a motion, or
10 request, I should say, that asks me to make inquiry of
11 you, and I shall do so.

12 In any criminal case, there is always a
13 possibility that people who are represented by the same
14 lawyer, there is the least the possibility they may
15 have a conflict of interest if there's more than one of
16 them. The man who just appeared before you came up
17 here was an example in a criminal case, and let's
18 suppose it was claimed that he was part of a criminal
19 conspiracy which consisted of more than one person.

20 You could easily imagine a situation where
21 those people's interests would be different because one
22 of them wants to say that he was the guy who did it,
23 while the other one wants to say the same thing.
24 Ordinarily, in that situation, the Court would make
25 sure that each of them have separate lawyers.

1 I take it then, please answer "Yes" or "No",
2 you all wish to be represented by the lawyers who
3 appear?

4 MULTIPLE VOICES: Yes.

5 THE COURT: And it's not a problem for you
6 that they also represent all the other Defendants, as
7 well?

8 MULTIPLE VOICES: No.

9 THE COURT: So you consent to that?

10 MULTIPLE VOICES: Yes.

11 THE COURT: Anything else, Ms. George?

12 MS. GEORGE: No, Your Honor.

13 THE COURT: All right. So that's fine.

14 So, having been advised of your rights, I'm
15 going to enter pleas of not guilty because that seems
16 appropriate, and ask counsel to provide me with a date
17 for a trial.

18 MR. GOLDSTONE: Your Honor, I'd like to --
19 First of all, I'd like to ask the Court to allow the
20 Defendants to sit while I address the Court.

21 THE COURT: Of course. Please, be seated.

22 MR. GOLDSTONE: Your Honor, the facts in this
23 matter are -- First of all, Mark Goldstone.

24 THE COURT: Good morning, Mr. Goldstone.

25 MR. GOLDSTONE: Good morning.

1 The facts in this matter aren't substantially
2 in dispute. I think what was in dispute is the
3 application of this particular statute to their
4 particular conduct, and we've been back and forth with
5 the Government over several months to try to resolve
6 this, and we are very interested in resolving this
7 matter.

8 We had discussions with the Defendants and
9 they might be interested in entering pleas of nolo
10 contendere if the Court would allow that, possibly even
11 entering conviction -- entering pleas to straight up --
12 straight up to the charge, and the issue came up as to
13 whether or not this Court is entitled to or authorized
14 to entertain a straight up plea to a D.C.M.R., District
15 of Columbia Municipal Regulation violation for failure
16 to obey, and there's a lot of interest among the
17 Defendants in pursuing that because again, the facts
18 are not substantially in dispute.

19 A 13 Co-defendant trial would -- obviously a
20 big burden on -- that is a big burden on the
21 Government, time and expense, subpoenas, witnesses,
22 documents, videos and so forth, and the question arose
23 as to whether or not the Court would entertain a
24 potential plea to a D.C.M.R. violation for failure to
25 obey.

1 THE COURT: Counsel, before you go on, I
2 copied, this morning, the regulation that is cited in
3 the Complaint, in the Code of Federal Regulations.
4 That's a violation of C.F.R., not D.C.M.R.

5 MR. GOLDSTONE: Right, and I've reviewed this
6 and the challenge behind the statute is not necessarily
7 that the Defendants did or did not violate a lawful
8 order because, of course, that's what a trial process
9 would be for, but the challenge is that this statute,
10 as interpreted by the Government, results in a
11 permanent adult criminal conviction, --

12 THE COURT: I see.

13 MR. GOLDSTONE: -- which is a six-month
14 defense, and that's not historically been the pattern
15 of arrests at the White House.

16 Be that as it may, the defense would be
17 interested some resolution that would allow this Court
18 -- well, allow them to acknowledge that there might
19 have been a failure to obey, but would not result in a
20 permanent adult criminal conviction. We believe that a
21 violation under the D.C.M.R., failure to obey, if the
22 Court would entertain that, would allow the Government
23 to establish that they, you know, received a lawful
24 order and they refused to obey it, which would satisfy
25 the Government's purpose, as well as the Court's

1 purpose and, you know, again, not having 13 --

2 THE COURT: Counsel, have they been
3 fingerprinted?

4 MR. GOLDSTONE: Fingerprinted?

5 THE COURT: Were they fingerprinted when
6 there were arrested?

7 MS. GEORGE: Yes, they were processed your
8 Honor, and fingerprinted.

9 THE COURT: So they were fingerprinted and
10 photographs were taken; is that right?

11 MS. GEORGE: That's correct.

12 THE COURT: Now, Ms. George, did that not go
13 into the National Law Enforcement Center?

14 MS. GEORGE: (No audible response.)

15 THE COURT: So there exists a public record
16 of their arrest; isn't that right?

17 MS. GEORGE: I believe so, Your Honor. I'm
18 not exactly sure that the --

19 THE COURT: Let me ask the pretrial --
20 Pretrial Services?

21 THE PRETRIAL SERVICES OFFICER: Yes, Your
22 Honor.

23 THE COURT: What do you understand to be the
24 status of the record that was created, according to
25 what you have?

1 MS. GEORGE: Your Honor, Pretrial was just
2 notified this morning.

3 THE COURT: Okay.

4 MS. GEORGE: -- about (unintelligible).

5 THE COURT: Well, just on the basis of your
6 experience, the C.F.R. violation --

7 THE PRETRIAL SERVICES OFFICER: They were
8 fingerprinted and processed by a law-enforcement
9 agency, and should have been submitted to the FBI
10 (inaudible).

11 THE COURT: And so that will go into that
12 index and remain there?

13 THE PRETRIAL SERVICES OFFICER: I believe so,
14 Your Honor.

15 THE COURT: Okay.

16 So does it remain there irrespective of the
17 resolution of this matter? Assuming they were all
18 acquitted, what would happen then?

19 MS. GEORGE: Your Honor, our office and the
20 law enforcement agency would (inaudible) to the NCIC.

21 THE COURT: I see.

22 MS. GEORGE: -- (inaudible).

23 THE COURT: But as counsel understands it,
24 that would not be true if we were to use a District of
25 Columbia offense.

1 I guess what's confusing me, Counsel, it
2 looks like the record has already been created.

3 MR. GOLDSTONE: You know, the record of the
4 arrests --

5 THE COURT: The arrests.

6 MR. GOLDSTONE: -- at the White House, --

7 THE COURT: Yes.

8 MR. GOLDSTONE: -- which the Government
9 (inaudible) to challenge it. The challenge is that --
10 -- Let me give you one example of -- among the 13
11 Defendants.

12 Miriam Ben Shalom is 63 years old. She's a
13 public employee. She's a teacher (inaudible)
14 Wisconsin. If this were entered as a criminal
15 conviction, Ms. Ben Shalom would likely be fired from
16 her position, at 63 years old, unlikely to ever retain
17 a position again as a teacher and, she tells me,
18 (inaudible) work under Wisconsin law, she would not
19 even be entitled to unemployment insurance in the event
20 she lost her job as a result of chaining herself to the
21 White House fence.

22 Another example, Mara Boyd, 29 years old, was
23 in the Air Force program at -- in a ROTC program while
24 a student at Boulder, Colorado. She was discharged by
25 Don't Ask/Don't Tell. The close -- Don't Ask/Don't

1 Tell has now been repealed. She's eligible to
2 reenlist. If she has a criminal conviction, Your
3 Honor, she would not be allowed to reenlist.

4 So that's -- those are two examples of --

5 THE COURT: Well, here's --

6 MR. GOLDSTONE: -- the practical impact of
7 pleading to a charge that results in a criminal
8 conviction.

9 The Defendants are not concerned about fine
10 amount. They're not really concerned about going to
11 jail, not really concerned about probation or community
12 service, but the real concern (inaudible) having
13 something that the Government designates as a criminal
14 conviction.

15 So we're sort of -- Their hands are sort
16 of --

17 THE COURT: Well, --

18 MR. GOLDSTONE: -- chained --

19 THE COURT: -- let me share with you and Ms.
20 George and the Pretrial Services Agency, an idea I
21 have.

22 It is pretty clear under the D.C. Circuit's
23 authority, that I don't have jurisdiction, nor does any
24 other judge of the court, over D.C. offenses, but I
25 certainly do have jurisdiction when they are combined

1 with a federal offense. So I have, on more occasions
2 than I can remember, taken pleas to D.C. Code offenses
3 because they were the third count of a three-count
4 indictment, the first two counts of which were federal
5 indictments.

6 Could we resort to the strategy of having a
7 Complaint that charges simultaneously, a D.C. Code
8 offense, the Defendants would plead guilty to the D.C.
9 Code offense, the Government would agree to dismissal
10 of the federal offenses, and we could end the matter
11 there?

12 MS. GEORGE: Your Honor, excuse me, it's not
13 a question of whether the Court has the authority to do
14 so. I discussed that (inaudible).

15 The Government agrees with the Court. The
16 issue is whether the facts of the case support the
17 elements of the D.C. Municipal Regulation charge.

18 I, along with my supervisor, reviewed that
19 charge when Mr. Goldstone presented it to the
20 Government. We have -- And I would just like to say
21 for the record, the Government has considered every
22 counteroffer that Mr. Goldstone and Ms. Wilcox have
23 presented, very genuinely, and have thought it over
24 very extensively.

25 We come with the issue with regard to the

1 failure to obey a lawful order on the D.C.M.R. I will
2 read the statute, it's very short, the statutory
3 section to the Court. It's the Government's position
4 that the facts do not support a plea under that
5 particular charge, and that's why the Government --

6 THE COURT: Well, that's --

7 MS. GEORGE: -- did not accept their
8 counteroffer.

9 THE COURT: There's another way to skin the
10 cat.

11 Disorderly conduct statute, loud and
12 boisterous.

13 They were chanting, weren't they?

14 MS. GEORGE: There were speaking --

15 THE COURT: Didn't that tend to occasion the
16 breach of the peace?

17 MS. GEORGE: They were speaking, according to
18 the officers, but they were not screaming, and that's
19 why the officers did not particularly charge them with
20 disorderly conduct under the D.C. offense, Your Honor.

21 THE COURT: Well, --

22 MS. GEORGE: The elements are different under
23 the C.F.R..

24 So the Government has reviewed -- We wanted
25 to resolve the case, as well, and so I believe the D.C.

1 regulations, as well as the C.F.R. regulations.

2 Unfortunately, the C.F.R. regulations have --

3 THE COURT: Well, I'm not --

4 MS. GEORGE: -- penalty of six months.

5 THE COURT: You haven't convinced me.

6 I mean, there's a case on trial before Judge
7 Lamberth involving the precise issue of the meaning of
8 the word, "disorderly conduct" and "loud and
9 boisterous." It involves a woman who was inside of a 7-
10 Eleven. It's late in the evening. She gets into some
11 sort of (unintelligible) with the police, and raises
12 her voice and calls them a few impolitic and unladylike
13 words. She's arrested for disorderly conduct.

14 And during the course of the trial I have sat
15 there where they have reviewed the section of the
16 disorderly conduct, and the argument made in that case
17 is that she violated the law because she was loud and
18 boisterous; that is, her voice carried onto the street
19 and tended to invoke the breach of peace of the people
20 that were across the street. That is a common use of
21 the disorderly conduct statute in the District of
22 Columbia.

23 You are aware, Ms. George, what I used to do
24 for a living.

25 MS. GEORGE: Yes, I am, Your Honor, but there

1 are other elements of the disorderly conduct that we --
2 but, I mean, if the Court is willing to accept the
3 plea, I mean, the Government has to do what it thinks
4 is --

5 THE COURT: If you will add disorderly
6 conduct under the District of Columbia statute, and I
7 convinced myself, as I think I already have, that the
8 chanting crosses the line and makes it loud and
9 boisterous, I would surely permit the Defendants to
10 plead guilty to disorderly conduct and, if you wish
11 and make the motion, dismiss the federal charges in
12 consideration of their plea.

13 MS. GEORGE: I certainly will present it to
14 my supervisors and if we come to a different conclusion
15 before coming to court, then we will reconsider it and
16 the Court's --

17 THE COURT: Please look at the disorderly
18 conduct statute. Indeed, (inaudible) Mr. Goldstone
19 agrees with me, but if you go back in history to the
20 early demonstration cases in the '50s and '60s, we
21 usually prosecuted it as disorderly conduct cases.

22 MS. GEORGE: Right, and that's --

23 THE COURT: The famous Supreme Court case,
24 isn't that Birmingham case, somebody verses Birmingham,
25 City of Alabama. Wasn't that a discon (phonetic) case

1 involving Martin Luther King?

2 MR. GOLDSTONE: Absolutely, Shoalsberger
3 (phonetic).

4 THE COURT: Yes, Shoalsver -- Shoalsberger
5 (phonetic). That led to the Defendant's
6 (unintelligible) from the Birmingham jail.

7 MR. GOLDSTONE: The challenge, Your Honor, is
8 that from the outset the Government, and I'm not sure
9 exactly what the procedure was, but the Government
10 checked off a box on the tickets that did not allow
11 them to (inaudible) conviction, so when we talked to
12 the Central Violations Bureau, they referred us back to
13 the Government (inaudible) said (inaudible) Central
14 Violations Bureau, and referred us back to (inaudible)
15 never really -- they got to check the box (inaudible)
16 (inaudible) which, for the last 25 years, has really
17 been a pattern and practice at the (inaudible).

18 So (unintelligible) the six-month offense,
19 the criminal conviction and, you know, we're sort of
20 stuck, and now what we're hearing from Ms. George is
21 positive (inaudible) between the (inaudible) that, "Oh,
22 we're gonna have to come back." I mean, it if she
23 could make a call to her supervisor to see if they can
24 resolve that, but that would certainly, you know, speed
25 up this process.

1 THE COURT: Interesting enough, the case
2 before Judge Lamberth involves post and forfeit. She
3 posted and forfeit on the discon (phonetic) charge.
4 Never went to court.

5 MS. GEORGE: Well, I understand that, Your
6 Honor. I understand, because that was done at the
7 police district, and that's typically where it's done.

8 Unfortunately, in this circumstance the
9 Defendants were not charged on the D.C. Code offense,
10 they were charged on the C.F.R., and at that point in
11 time the officers had the option to select the box that
12 says, "You must appear in court," which is what was
13 done and has been done since I've been the magistrate
14 court AUSA, since 2005.

15 So the pattern Mr. Goldstone is speaking of
16 may have been interrupted starting at that point in
17 time, but with all of the demonstrator cases I've
18 prosecuted, they've been required to appear in court,
19 and that's what's been done.

20 THE COURT: All right.

21 Well, how do you want to proceed today? I am
22 available all day. If you want to take some time today
23 and speak to your supervisors and perhaps we can
24 reassemble? So I assume a lot of these --

25 MS. GEORGE: Your Honor, I certainly can

1 review it. It certainly -- That's not a problem.

2 THE COURT: All right. All right.

3 What are counsel's availability towards the
4 latter part of the afternoon? I'm thinking about 3
5 o'clock. I'll excuse the Defendants and I'll -- Yes?

6 MR. GOLDSTONE: Well, if the Defendants are
7 going to be entering a plea today, then they would come
8 back at 3 o'clock, is the Court's --

9 MS. GEORGE: And the Government would need a
10 opportunity to amend the plea documents and get that --

11 THE COURT: Well, we'll need -- That's why
12 I'm putting it off for so long, because it's going to
13 take some time. We got to do it 13 times so -- but
14 I'll be here all day. If I have to stay later, we
15 will.

16 MR. GOLDSTONE: That's acceptable to the
17 Defendants.

18 MS. WILCOX: Your Honor, if the Court did
19 (inaudible) section (inaudible) just ask (inaudible).

20 THE COURT: Okay. Thank you.

21 So we're agreed, we'll reassemble at 3
22 o'clock?

23 MR. GOLDSTONE: Yes.

24 THE COURT: All right.

25 MS. GEORGE: And, Your Honor, could the

1 Government just place its representations on the record
2 with regard to Mr. -- I believe his name is
3 Finkenbinder? The Government will reserve its right to
4 (unintelligible) bench warrant, and the Government
5 would also request that Defense Counsel submit Mr.
6 Finkenbinder's itinerary for today, and I'll make
7 representations about the personnel that actually
8 reported the information.

9 MR. GOLDSTONE: Your Honor, we object to
10 (unintelligible). Ms. (unintelligible) is also in
11 court. She said it was an emergency, but we'll provide
12 the other documentation (inaudible).

13 THE COURT: That will suffice. All right.

14 What I want to do now, Ladies and Gentlemen,
15 is I want each of you to meet with the Pretrial
16 representatives (unintelligible) represent, do a brief
17 report, and then you'll be excused and we'll reassemble
18 at 3 o'clock, all right? Right.

19 MS. WILCOX: Thank you, Your Honor.

20 MS. GEORGE: Thank you, Your Honor.

21 MR. GOLDSTONE: Thank you, Your Honor.

22 THE COURT: Thank you.

23 (Recess at 10:11 a.m., until 3:27 p.m.)

24 AFTER RECESS

25 THE CLERK: Recalling Criminal Case Year

1 2010-739-M, United States v. Raphael Farrow, Autumn
2 Sandeen, Michael Bidwell, Evelyn Thomas, Miriam Ben
3 Shalom, Scott Wooledge, Justin Elzie, Mara Boyd, Robin
4 McGehee, Robert Smith, Daniel Choi, Ian Finkenbinder,
5 who is not present, Daniel Fotou.

6 Representing the Government is Angela George.

7 Representing the Defendants is Mark Goldstone
8 and Ann Wilcox.

9 This is a continuation from this morning's
10 initial appearance and arraignments.

11 THE COURT: Well, we had presented the
12 Defendants so the matter would simply be before me to
13 set a trial date but, of course, I urged some
14 discussions between the Government and the Defendant,
15 in terms of where we go from here.

16 What is your position, Ms. George?

17 MS. GEORGE: Your Honor, the Government took
18 the Court's recommendation back to my office and I
19 researched it. I also spoke with Pat Riley, as well as
20 my immediate supervisor, and I did have the opportunity
21 to speak with the chief of the Division of Public
22 Safety at the Office of the Attorney General.

23 The Government, at this point time, is not
24 prepared to accept or object to the Court's
25 recommendation. The Government is requesting some

1 additional time to actually research whether the facts
2 of this case constitute a breach of peace (inaudible)
3 the disorderly conduct statute.

4 In the time that I had during the recess, the
5 Government also reviewed D.C. Code Section 221307,
6 which is unlawful assembly, because the Court stated
7 that under a loud and boisterous theory the Defendants
8 could possibly plead guilty to disorderly conduct, but
9 that is a charge that may be applicable.

10 The Government did research that initially
11 and does not believe that the Defendant's conduct
12 constitutes boisterousness under the plain meaning of
13 that term, but the Government is continuing to research
14 it, Your Honor.

15 And the Government also wanted to express to
16 the Court that it has, on its own, outside of Mr.
17 Goldstone's counteroffers, tried to find a charge that
18 the Defendants could plead guilty to.

19 It is -- This case is uniquely situated. It
20 does not constitute a no permit charge because the
21 Defendants stood on the masonry base, which is in
22 between the base of the White House fence and the
23 sidewalk. So under the -- 36 C.F.R. 7.96, they aren't
24 in violation of the no permit rule, so we could not
25 charge them with no permit.

1 The Defendants specifically want to plead to
2 a charge where they can post and forfeit, and I did
3 speak with Ms. Brown, and what she educated me, and I
4 already knew, I just confirmed with her, that that
5 option is an option perceived by the D.C. Code, where
6 you would do that prior to coming to court. The
7 statute specifically says that, the procedure
8 contemplates that.

9 And then Ms. Brown indicated that while if
10 they pled guilty to D.C. Code offense, disorderly
11 conduct, they theoretically could post and forfeit, but
12 the statute also contemplates that MPD and the Office
13 of Attorney General manage that process.

14 So, given that this is a federal case, that
15 option may not even be accessible, even if they pled
16 guilty to disorderly conduct in this circumstance.

17 And so the Government is continually trying
18 to do what the Court asked us to do. We will consider
19 it, and what the Government's proposing is that we set
20 a status date in May. Counsel and I discussed some May
21 dates, just to resolve this issue, to determine if the
22 Government will file a complaint.

23 THE COURT: And I'll excuse the Defendants
24 from appearing.

25 MS. GEORGE: And the Government suggested

1 that to Defense Counsel, Your Honor.

2 THE COURT: All right.

3 MS. GEORGE: And to select, also, a
4 plea/trial date in September so that Defendants can
5 plan accordingly, with regard to their expenses, if
6 necessary to come to court on the date.

7 THE COURT: All right.

8 Well, that strikes me as reasonable.

9 Mr. Goldstone?

10 MR. GOLDSTONE: Yes, thank you, Ms. George.
11 That was a nice presentation.

12 The only thing I'd like to say, Judge, is
13 that the Defendants are interested in pleading guilty
14 to disorderly conduct, and I expressed my concerns
15 about the collateral consequences of a conviction as to
16 Ms. Merriam Ben Shalom and Mara Boyd.

17 Over the lunch break I learned that there's
18 other teachers in the group that would similarly be
19 impacted, including Evelyn Thomas.

20 So, the consequences of the criminal
21 conviction are real. They're not fictional. They're
22 very, very real, and that's the main goal that we're
23 trying to avoid.

24 THE COURT: Uh-huh.

25 MR. GOLDSTONE: So what I was trying to

1 propose to Ms. George was that we would accept a plea
2 of guilty to the disorderly conduct under the D.C.
3 Code. The Government would give us credit for time
4 served. The Government would ask for a fine, but they
5 did not specify the amount of the fine, and that they
6 would allow me to speak to the Court to see whether or
7 not I could arrange a post and forfeit under the D.C.
8 operation, and our research showed that 221321,
9 disorderly conduct, is included as an eligible post and
10 forfeitable offense by the board of judges, payments
11 made at the district station for the offense charged.

12 What -- If the Government would allow us, we
13 could plead to the disorderly conduct charge, I could
14 be given 30 days within which to see whether or not the
15 district station would accept my posting of whatever
16 fine amount was agreed to by us and the Court, try to
17 post that amount, bring a receipt back to the Court and
18 then the Court could have it entered as a post and
19 forfeit under D.C. Code 221321.

20 I understand it's a slightly unusual request
21 but I'm not so sure that that wouldn't work, and it
22 would -- again, getting back to my point earlier, it
23 would get the Government, you know, largely what they
24 wanted, which is they didn't want to offer a post and
25 forfeit, they're not offering a post and forfeit. It

1 would get the defense what it was requesting, which is
2 to avoid a conviction for something that the Government
3 agrees is not the most serious charge out there, and
4 would avoid the Court from having to try a case of 13
5 Co-defendants with all that that would entail, on a
6 charge that's really never been tested out, which is
7 this failure to obey a lawful order, which would entail
8 a lot of emotions and a lot of procedure and a lot of,
9 you know, legal business to figure out whether or not
10 they disobeyed a lawful order, which they're not really
11 contesting in so many words. So, that was one
12 possibility that I wanted to propose.

13 The other possibility, Your Honor, and the
14 Government takes the position that D.C.M.R. ---18
15 D.C.M.R. Code 2000 is not available, and that's the
16 traffic offense of failure to obey under a traffic
17 offense.

18 THE COURT: Yes.

19 MR. GOLDSTONE: They take the position,
20 "Well, they're up on the ledge and therefore, you know,
21 nothing was blocked." All right. Fine. But, you
22 know, I would ask the Government to go back and look at
23 whether or not 18 D.C.M.R. 2000, you know, really
24 doesn't apply with respect to the Government's point of
25 breach of the peace.

1 You know, I've litigated a lot of matters
2 under the breach of peace statute, and the breach of
3 the peace statute really refers to whoever, with intent
4 to provoke a breach of peace, or under circumstances
5 such that a breach of the peace may be occasioned
6 thereby, and the Government is surprisingly taking a
7 position, "Well, we'll don't have the breach of peace
8 here," and I, the Defense, have taken a position,
9 "Well, there might have been a breach of the peace."

10 It's a very, very unusual situation that we
11 find ourself in. So my second option would be to
12 perhaps allow the Defendants to enter a plea to the
13 District of Columbia disorderly conduct under 221321
14 and then hold this in abeyance for a period of six
15 months, and then if they are not rearrested and if they
16 don't violate a stay away, that the Court would impose
17 for the White House fence, then the Court could, sua
18 sponte, on its own motion, dismiss the matter after a
19 period of six months or nine months, whatever the Court
20 wanted.

21 Again, I wanted to point out something that
22 was raised this morning. These are largely first
23 offender matters. These are clearly nonviolent. The
24 Government is not alleging any breach of the peace and,
25 as I mentioned earlier, Don't Ask/Don't Tell has been

1 repealed. It is extremely unlikely that this
2 particular group or individuals in this group are going
3 to go back to the White House over a period of time
4 that the Government rightfully should have the, you
5 know, the sidewalks and the White House fence not, you
6 know, not, you know, impeded by anyone's demonstration.

7 So, Your Honor, in sum, I would ask for
8 consideration of a 221321 plea, with the opportunity to
9 have me explore whether or not I can -- and Ms. Wilcox
10 can make a post and forfeit occur. I don't know that I
11 can, or perhaps allow us to plead to that 1321 and
12 simply hold it in abeyance and then dismiss at the end
13 of a couple of months.

14 So that would be my plea to the Court.

15 THE COURT: And I take it, Ms. George, you
16 are going to give each of those active consideration?

17 MS. GEORGE: We have already done so. I
18 would just -- I would like the record to reflect so
19 that the Court clearly understands. Mr. Goldstone, Ms.
20 Wilcox and myself have been negotiating this matter
21 practically every day, almost every day since I
22 returned from sick leave, which was January 24th.

23 THE COURT: Uh-huh.

24 MS. GEORGE: Mr. Goldstone has presented the
25 (unintelligible) agreements/defer prosecution option to

1 the Government. We have considered that. We will
2 continue to consider it, as requested by the Court.

3 Mr. Goldstone misstated the Government's
4 position with respect to the disorderly conduct. What
5 I expressed to him is that the Government, at this
6 point in time, is unsure of whether the facts of this
7 case would support a plea under the disorderly conduct
8 statute, for the -- in the D.C. Code, and that we will
9 continue to research that. It is still potentially an
10 option at this point in time.

11 The Government did not tell him that we did
12 not -- that we thought it was not a breach of peace.
13 We have not finished researching it, and that's why we
14 asked for more time from the Court.

15 THE COURT: All right. I will grant you that
16 time primarily because the decision is for you, and not
17 me, to make, because you are the prosecuting authority,
18 and the decision of what charges to make falls entirely
19 within the Executive Branch responsibility, but I just
20 would urge you and the United States Attorney's Office
21 to give these proposals very serious thought.

22 The protest was about, as counsel has just
23 explained, the subject is moot because of a change in
24 law. None of these people have prior criminal records,
25 and obviously some of them, the consequences could be

1 quite devastating, in terms of their continued
2 employment, and I believe more than one -- Is it true
3 that one of them also wishes to reenter the service of
4 our country?

5 UNIDENTIFIED SPEAKER: Yes, sir.

6 MR. GOLDSTONE: Yes, Your Honor.

7 THE COURT: That's an important
8 consideration, as well.

9 Thank you, Ms. George.

10 MS. GEORGE: Thank you.

11 THE COURT: Thank you, Counsel.

12 All right. So I'm going to excuse the
13 Defendants without requiring them to come back to court
14 at all, until we resolve this, and what date did you
15 want them to come back?

16 MS. GEORGE: We were still discussing the
17 dates, Your Honor. Just a brief indulgence.

18 THE COURT: Well, you better get a date for
19 me because I'm going to keep this case.

20 (Pause.)

21 MS. GEORGE: The Government and the Defense
22 Counsel request May 10th, Your Honor, and that's a
23 Tuesday, just for the status, between 9 and 12:00 p.m.

24 THE COURT: Yes.

25 Would you look at May 10th for me, please?

1 THE CLERK: (Inaudible) London.

2 THE COURT: Oh, yes, I'll be overseas.

3 Can I have another date, please?

4 MR. GOLDSTONE: Can we meet over there, Your
5 Honor?

6 (Laughter.)

7 MS. GEORGE: Any other date in -- Any other
8 Tuesday or Thursday morning prior to August and after
9 is fine with the Government.

10 THE COURT: I did a moot court over there
11 with British judges and when the lawyers spoke to the
12 British judges they said, "My Lord," and then when they
13 spoke to me, they said "Your Honor." I said, "What
14 happened to 'My Lord'?"

15 (Laughter.)

16 THE COURT: I wanted to be the first guy from
17 Brooklyn ever called "My Lord" but it didn't work out.

18 (Pause.)

19 (The Court and Counsel confer.)

20 THE COURT: May 17th, then?

21 (The Court and Counsel confer.)

22 MS. GEORGE: And then Defense Counsel
23 suggested September 19th for the potential plea or
24 trial date.

25 I'll just note for the record that on

1 September 23rd and a 26th I have scheduled (inaudible)
2 be available --

3 THE COURT: Yes.

4 Judge Kay and I have shifted months, so I'll
5 be here in August and September.

6 THE CLERK: So September 19th is on a Monday.

7 THE COURT: So, both -- any date in September
8 or August are available.

9 MS. GEORGE: The Government doesn't -- If
10 there is a trial, don't expect it to be longer than
11 four days. I expect that we would be done by September
12 22nd.

13 THE COURT: Okay.

14 MS. GEORGE: Because I'm out of the
15 jurisdiction on the twenty-third and the twenty-sixth.

16 THE CLERK: Okay. That's a criminal month
17 and you want the trial to be held (inaudible).

18 THE COURT: (Unintelligible.) We'll work
19 around it.

20 THE CLERK: Okay.

21 So we have September 19th at 9:30?

22 MS. GEORGE: Yes, please.

23 THE CLERK: And that's for a trial -- a bench
24 trial?

25 MS. GEORGE: A plea or a trial.

1 THE CLERK: Plea or a trial.

2 MR. GOLDSTONE: And, Your Honor, there's one
3 other matter.

4 The marshal came out to us at the lunch break
5 to say the Defendants had not yet been processed and
6 they will -- were requesting photographs, fingerprints
7 and other information which, my understanding is that
8 because they were arrested by the Park Service and then
9 released after a couple of hours, that that's an
10 appropriate procedure.

11 I just wanted to make sure, you know, from
12 the Court, that they're not being treated any
13 differently than anyone else who's come to court.

14 My understanding is, of --

15 THE COURT: Not that I'm aware of. It's
16 always --

17 MR. GOLDSTONE: My understanding is it's
18 standard procedure. I just wanted to make sure that
19 there's no --

20 THE COURT: That's my understanding as well.
21 That your understanding, as well?

22 MS. GEORGE: Yes, Your Honor.

23 THE COURT: All right. So be it.

24 MR. GOLDSTONE: Thank you, Your Honor.

25 THE COURT: Thank you.

1 All right. The matter is set down for a so
2 refer -- or consultation with the Court in May.
3 Defendants are excused from appearing therefrom.

4 We will not issue, at this point, a return to
5 court notice until that is resolved, otherwise we'll
6 summon the Defendants to be present on the eighteenth,
7 if we can't resolve it on -- otherwise.

8 That the understanding we all have?

9 MR. GOLDSTONE: Yes, Your Honor.

10 THE COURT: Thank you.

11 MS. GEORGE: Your Honor, the parties did
12 agree outside in the hall whether -- that the
13 Government will request an internal (phonetic) court
14 notice now, so that the Court will have a --

15 THE COURT: So be it. All right.

16 Then that will be for September?

17 MS. GEORGE: Yes.

18 THE COURT: So what -- You've agreed to that?

19 (No audible response.)

20 THE COURT: It's so ordered. Please give
21 each of the Defendants a return to court notice for
22 September.

23 THE CLERK: For September the 19th?

24 THE COURT: Whatever date we've set.

25 MS. GEORGE: That's correct.

1 And just for the record, Your Honor, the
2 Government is, as I said earlier, not requesting to
3 have a hearing. It's for the status hearing in May
4 (inaudible).

5 THE COURT: Yes. We're all agreed that the
6 Defendants do not have to appear. That is a
7 consultation between the Court and Counsel as to how to
8 proceed.

9 THE CLERK: Okay.

10 Your Honor, can I do one return to court
11 notice and make 13 copies?

12 THE COURT: I think that would be perfectly
13 acceptable.

14 THE CLERK: It will be just Raphael Farrow,
15 would that -- et al.

16 Which means all of you, okay?

17 THE COURT: All right? You understand it
18 will have Raphael's name, but it will -- requires all
19 of you to come in September. We can't figure out what
20 to do in May.

21 All right? Do you understand that?

22 MULTIPLE VOICES: Yes, Your Honor.

23 THE COURT: Thank you very much.

24 MS. GEORGE: (inaudible) the Court would
25 order a summons (inaudible) for September.

1 THE COURT: I guess we're gonna have to do
2 that for Mr. -- A summons will issue for Mr.
3 Finkenbinder for September.

4 (Pause.)

5 MS. GEORGE: And, Your Honor, Ms. Smith
6 reminds me that we need to set release conditions.

7 The Government's requesting that the
8 Defendants --

9 THE COURT: All right.
10 Defendants will be released upon the
11 following conditions:

12 Defendants will be released to live at the
13 homes they have provided -- the home addresses they
14 have provided to the Pretrial Services Agency.

15 While this matter is pending they shall not
16 leave the United States without my permission in
17 advance.

18 I will relieve them of any other conditions
19 of release, given the nature of the charges and the
20 fact that they all have significant roots in the
21 communities in which they live.

22 THE CLERK: Okay. Then there's no need for a
23 return to court notice. (Unintelligible) you going to
24 put that on the release order, I mean the return to
25 court date?

1 I'm sorry?

2 UNIDENTIFIED SPEAKER: Are you going to put
3 the return to court date --

4 THE CLERK: Yes.

5 UNIDENTIFIED SPEAKER: -- the nineteenth?

6 THE COURT: The September date, please.

7 (Pause.)

8 THE COURT: All right.

9 What's happening now is she's preparing
10 release conditions which is going to be signed by me.
11 On your release conditions, and you all will get a copy
12 of this, that will have the date upon which you have to
13 come back to court.

14 If you look back of that document you will
15 see all the things that will happen if you don't show
16 up. None of them are pleasant, but I just want to make
17 sure we all have an understanding that the document
18 you're about to get requires you to come back to court
19 on the eighteenth, unless your Counsel and the United
20 States can work out something else.

21 You understand it, all of you?

22 MULTIPLE VOICES: Yes, Your Honor.

23 THE COURT: Thank you.

24 They'll each get one such notice; isn't that
25 right?

1 THE CLERK: Yes (inaudible).

2 THE COURT: Ms. Smith, do you need a minute
3 or two?

4 THE PRETRIAL SERVICES OFFICER: Yes, please,
5 Your Honor.

6 THE COURT: All right. Please remain here.
7 I'll be back as soon as she's ready.

8 (Recess at 3:46 p.m., until 4:01 p.m.)

9 AFTER RECESS

10 THE COURT: Thank you, ma'am.

11 UNIDENTIFIED SPEAKER: Right. Thank you.

12 THE COURT: Before you -- Did you alert the
13 Marshal?

14 THE COURT SECURITY OFFICER: The Marshal was
15 here.

16 THE COURT: The Marshal was here?

17 THE COURT SECURITY OFFICER: Yes, Judge.

18 THE COURT: Thank you everybody. Good day.

19 (Proceedings concluded at 4:03 p.m.)
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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceedings
in the above-entitled matter.

/s/ _____

March 28, 2011

STEPHEN C. BOWLES